IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 45 OF 2005

Vaman Jaidev Raval,
presently in Central Jail Aguada. ..... Appellant

V e r s u s

The State of Goa ..... Respondent

Mr. S. G. Dessai, Senior Advocate with Mr. S. Dessai, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent.

CRIMINAL APPEAL NO. 46 OF 2005

Shri Jaidev Vaman Raval @ Depeek P. Malvankar,
presently in Central Jail Aguada. ..... Appellant

V e r s u s

The State of Goa ..... Respondent

Mr. S. G. Dessai, Senior Advocate with Mr. S. Dessai, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent.

CRIMINAL APPEAL NO. 47 OF 2005

Shri Prashant Vaman Raval @ Prashant L. Nail,
presently in Central Jail Aguada. ..... Appellant

V e r s u s

The State of Goa ..... Respondent

Mr. S. G. Dessai, Senior Advocate with Mr. S. Dessai,Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent.

CRIMINAL APPEAL NO. 48 OF 2005

Shri Sanjeev @ Sanju Vaman Raval,
presently in Central Jail Aguada. ..... Appellant

V e r s u s

The State of Goa ..... Respondent

Mr. S. G. Dessai, Senior Advocate with Mr. S. Dessai, Advocate for the Appellant.

Ms. Coutinho, Public Prosecutor for the State/Respondent.

CORAM : DR. S. RADHAKRISHNAN
N. A. BRITTO, JJ.

DATE: 11TH DECEMBER, 2006.

JUDGMENT (Per N. A. BRITTO, J.)

These appeals have been filed by the accused, who have been convicted and sentenced under Sections 302 and 307 read with Section 34 I.P.C. by the learned Sessions Judge, Panaji, vide Judgment dated 28.07.2005.

2. The accused belong to one family. Vaman J. Raval/A1, is the father of Jaidev @ Depeek/A2, Prashant/A3 and Sanjeev/A4. All the accused reside in one of the mundkarial houses situated in the property known as Tolle at Narva of Bicholim Taluka, belonging to Srinivas Vaikunth Parab Lawande, father of Vasant Lawande/P.w.2. Pandurang @ Pandu Malvankar along with his wife Padmavati, reside in another house. The mother of Suresh Lawande/P.w.19 also resides in one of the said houses. The said Srinivas Lawande died in the year 1988. The said Pandurang Malvankar has four daughters, one of whom is married to Vaman/A1 and as they had no son, the said Pandurang and Padmavati have adopted Deepak @ Jaidev/A2 by deed of adoption dated 22.06.1993. During the lifetime of the said Pandurang, the lease, if we may use that expression, of cashew and mango trees of the said property was with the said Pandurang Malvankar, the father in law of Vaman/A1, who died on or about 22.09.1993. It appears that after the death of the said Pandurang Malvankar, a dispute arose between the family of Lawande and the family of the accused regarding the enjoyment of the said property as a result of which, the said Vasant/P.w.2 and his brothers filed Regular Civil Suit No. 45/64/A and obtained an exparte injunction against the accused on 11.03.1994, which was subsequently confirmed on 11.10.1994, restraining the accused from

interfering in the said property. In the said Civil Suit, Padmavati, the widow of Pandurang and Deepak/A2, have taken a plea that they are agricultural tenants of the said property and they have also filed a tenancy case bearing no. TNC 56/94 before the Mamlatdar against Vasant/P.w.2 and his brothers. Although Vasant Lawande/P.w.2 had obtained the said injunction order against the accused, the enjoyment of the property continued to be with the accused till the year 2002, when presumably the cashew and mango crops were taken by Ranganath Bhinge, (since deceased), pursuant to agreements dated 28.02.2002 and 10.03.2002 (Exhibit 19 and 20 respectively). Thereafter, the said Vasant Lawande/P.w.2, obtained a licence for cutting trees from the said property on or about 23.08.2002 and the period of licence was extended to 07.10.2002 and in between the said Vasant/P.w.2 entered into an agreement dated 16.09.2002, Exh. 22, with deceased Ranganath Bhinge, for the sale and cutting of the said trees and it does appear from the evidence of Vasant Lawande/P.w.2, that during the said cutting of the said trees by the said Ranganath Bhinge, there was interference with the said cutting of trees from some of the accused, and, thereafter the said Padmavati and Deepak/A2 filed an application in the said tenancy case and obtained an ex parte Order dated 26.11.2002 restraining the family of Vasant

Lawande/P.w.2 from interfering with the possession of the said Padmavati and Deepak/A2. Vasant Lawande/P.w.2 entered into another agreement with the deceased Ranganath Bhinge dated 24.02.2003, Exh. 23, by which he sold the cashew and mango crops of that year to the deceased Ranganath and the present incident of assault took place on 08.04.2003, when the deceased Ranganath Bhinge, went to pluck mangoes from the said property with the plucker Anil Morajkar/P.w.6 and Suresh/P.w.19 and four other migrant labourers namely Suresh and Laximi Lamani and Suresh and Laximi Rathod, who were not examined by the prosecution as they could not be traced. The incident took place after mangoes of one tree were plucked.

3. Lavu Malwankar/P.w.4, an uncle of Vaman/A1 came to know about the incident upon hearing the noise in the direction of the house of Jairam Malvankar, who is his nephew, and, Premanand Malvankar/P.w.5 came to know about the incident through the labourers who came running to his house and informed him that somebody was assaulted. Both Lavu/P.w.4 and Premanand/P.w.5, went to the place and saw Ranganath Bhinge(since deceased) and Suresh Malvankar/P.w.19, with bleeding injuries and both were continuously asking for water. There, Lavu/P.w.4

was told by Suresh/P.w.19 that he was assaulted by Vaman/A1 with "danda" and by others, by iron rods. Premanand/P.w.5 telephoned the police who arrived at the scene and thereafter Lavu/P.w.4 informed about the incident to Narayan/P.w.7, the younger brother of Suresh/P.w.19. Lavu/P.w.4 and Premanand/P.w.5, both cousins of Suresh/P.w.19, accompanied the police along with the deceased and injured Suresh/P.w.19 to Primary Health Centre, Bicholim, where they were examined by Dr. Mascarenhas/P.w.24 and then sent to Goa Medical College at Bambolim. Narayan/P.w.7 first went to Primary Health Centre at Bicholim and then went to the Police Station where he lodged his complaint giving the names of all the accused having brutally assaulted the said Ranganath and Suresh. The said complaint came to be registered under Sections 307, 504, 506 read with 34 I.P.C. Ranganath Bhinge died on his way to Goa Medical College and subsequently Section 302 I.P.C. was added to the crime registered against the accused.

4. At the Primary Health Centre at Bicholim, when Suresh/P.w.19 was examined by Dr. Mascarenhas/P.w.24, he was found with the following injuries:-

> (1) Multiple lacerations with profused bleeding from each laceration. The laceration on the scalp was 8 cms in size; the laceration on the left thigh was 2.5 cms; the laceration on the leg shin was also 2.5 cms. There were multiple abrasions of various sizes all over the body, ranging from 5 to 10 cms. There was also a large haemotoma over the left lower thigh at the back; fracture of left upper tibia was suspected but it does not appear that it was ever confirmed.

Suresh/P.w.19 was referred to Goa Medical College and the opinion as regards the nature of injuries was reserved. The prosecution produced a medical certificate-exhibit 92, issued by the Goa Medical College, through the investigation officer, and, relying upon the decision in the case of ***Pretichand v. State of Himachal Pradesh, (AIR 1989 SC 702),*** the learned Sessions Judge held that the contents of the said certificate were proved. It may be noted that the said certificate-exhibit 92 was signed by two Medical Officers namely a Senior Resident in Neuro Surgery and an Associate Professor in the Department of the Neuro Surgery, G.M.C., Bambolim. The names of either of the said two doctors were not cited in the chargesheet and presumably as a result of which, they were not summoned and

examined in support of the said Medical Certificate-exhibit 92. The said Medico Legal Certificate-Exhibit 92 shows that a C.T. Scan taken of Suresh/P.w.19 had shown a linear fracture of right high parietal but the said C.T. Scan report was also not produced. The said Certificate-exhibit 92 was also not produced in terms of Section 294 of the Code of Criminal Procedure, 1973, (Code, for short) nor any other doctor was examined to identify the signature of the Senior Resident or the Associate Professor, who had signed the same. In the case of ***Pretichand v. State of Himachal Pradesh*** (supra), the doctor who had given the Medical Certificate was not available for giving evidence and another doctor was called for to identify the signature of the doctor who had issued the said medical certificate, but, that is not the case herein. It is well settled that a medical certificate or a post mortem report is not substantive evidence, it is only a previous statement based on the examination of the patient. It is only a statement given by medical officer in Court that it is substantive evidence and the certificate can be used only to corroborate his statement under Section 157 or to refresh his memory under Section 169 or to contradict the statement of the witness under Section 145 of the Evidence Act. One does not know on what basis the I.O./P.w.31 had made a statement that the Doctor who had issued the certificate was no longer in Goa Medical College. There is

absolutely no explanation from the prosecution, as to why the Associate Professor could not be summoned or for that matter the medical officer, who had taken the C.T. Scan. In the absence of the said Medical Certificate-exhibit 92, being duly proved by the prosecution, the injuries which Suresh/P.w.19 was found with, when examined by Dr. Mascarenhas/P.w.24, had to be considered only as simple in nature, in as much as there was no fracture proved in respect of the injuries, opinion of which was reserved. We may reiterate that a hurt certificate or a post mortem report is not substantive evidence unless the doctor who has issued the same is examined in support thereof and in case he is dead or not available, then it is necessary to get such certificate or report proved through persons who knew the handwriting/signature of the doctor who had issued the same.

5. The Post Mortem of the deceased was conducted by Dr. Sapeco/P.w.22, who found the following injuries on him:-

1) Stitched lacerated wound 6 cm x 6 stitched on along right parital eminece of scalp.

2) Stitched lacerated wounds 2 cms x 2 stitches wounds for left ear pinna.

3) Stitched lacerated wound 2 cms x 2 stitches on along right outer aspect of lower leg at its upper forth region.

4) Stitched lacerated wounds 1 2/4 cms x stitched up along right mid shin front.

5) Stitched lacerated wound 1 1/2 cms x stitched along right lower 3rd at shin front.

6) Stitched lacerated wounds 1 1/4 cms x stitched up along right lower 4th at shin front.

7) Stitched lacerated wound 1 2/4 cms x stitched up along left mid shin front.

8) Stitched lacerated wound 1 1/4 cms x stitched up along left lower third shin front.

9) Stitched lacerated wound 3 1/4 cms x 3 stitches on along left inner back of right upper arm.

10) Swelling and deformity with CREPITUS of fractured tibia and fibula bones at right upper forth of lower leg with 3 cms stitched up lacerated wound.

11) Abrasion of 2 x 3/4 cms with dried blood on was seen at right outer back of upper arm.

12) Transverse gapping contused lacerated wound of 7 x 1/2 cms along lower left back of scalp region.

13) Transverse gapping contused lacerated wound of 8 x 1/2 cms along occipital region of scalp at mid line.

14) Vertical gapping contused lacerated wound of 8 x 1/2 cms along occipital region of scalp at mid line.

15) Abrasion with dried blood of 3 x 1/2 cms on right mid back of upper arm.

16) Abrasion with dried blood on of 2 3/4 cms on right supinated aspect of forearm.

17) Oblique abrasion of 7 x 4 cms along left lower front of thigh at lower aspect.

18) Oblique abrasion of 8 x 1/4 cms along left knee cap region.

19) Parellel/railrod paterned red bruise of 9 x 1 cms along left outer aspect of lower leg at its upper forth.

20) Parellel/railrod paterned red bruise of 8 x 1 cm. Along left mid outer aspect of lower leg.

21) Parellel/railrod paternod red bruise of 7 x 1 cm. Along left lower forth of outer aspect of lower leg.

22) Parellel/railrod paterned red bruise of 6 x 1 cm. Along left mid back of upper arm.

It can be seen from the said description of the injuries and the report prepared by Dr. Sapeco that five of the injuries were located on the head, five were located on the hands and twelve injuries were located on the lower limbs. Dr. Sapeco opined that the death of the deceased was caused

due to haemorrhagic shock associated with fracture for right lower leg bones as a result of cumulative effect of injuries nos. 1 to 22 caused by hard or blunt force or object or surface impact, which were fresh at the time of death and were fatal in the ordinary course of nature.

6. In the above background, the accused came to be charged and tried under Section 504, 506(ii), 307 and 302 I.P.C. read with Section 34 I.P.C. with the allegation that on the aforesaid date and place at about 17.00 hours, the accused in furtherance of their common intention, abused, threatened and assaulted Ranganath Bhinge and the said Suresh G. Malvankar, while they had gone to pluck the mangoes, with deadly weapons like a bamboo and iron rods, thereby killing the said Ranganath Bhinge (deceased) and attempting to kill Suresh G. Malvankar/P.w.19. In support of the charge, prosecution examined 31 witnesses while the accused examined none. Although at one stage it was suggested to one of the prosecution witnesses that the deceased and Suresh/P.w.19 had assaulted one another because of differences between them over the right to pluck the fruits of the trees, the case of the accused in their statements under Section 313 of the Code, was one of denial simpliciter. The accused came to be acquitted under Section 504 and 506(ii) read with Section 34 I.P.C.,

(though there is no specific mention to Section 506(ii) I.P.C.), and convicted as aforesaid.

7. The evidence led by the prosecution could be summarized as follows:-

(a) Evidence of three witnesses who are stated to be the eye witnesses to the incident, namely Anil/PW6, Suresh/PW19 and Nitesh/PW21.

(b) Circumstantial evidence of the recovery of weapons from each of the accused.

(c) Circumstantial evidence of abscondence of the accused from the date of incident till they were made to surrender by Digambar/PW11, the brother-in-law of Jaidev/A-2 on 16-4-2003.

(d) Recovery of the clothes of the accused, the evidence of which has been disbelieved, and in our view rightly,s by the learned Sessions Judge.

8. If the attachment of the clothes of the accused was to be given any credibility the clothes of the accused ought to have been attached at the time when they were arrested and not after several days, after they were placed in custody. Although the accused were arrested on 16-4-2003, the pant/MO17 and the shirt/MO18 of Jaidev/A-2 were attached on 21-4-2003 while the banian/MO19 and the short/MO20 of Prashant/A-3 were attached on 22-4-2002 while those of Sanjeev/A-4 were attached on 23-4-2003. The green shirt of Jaidev/A-2(MO18) was recovered from the house of his sister Latika/PW10. She did not support the said story of recovery, and that apart, as per the report of CFSL no blood was detected on the said shirt(Exh.22-A). The fact that the other clothes of the accused were found to be blood stained would be of no significance whatsoever when the said clothes were not attached at the time of their arrest and were attached with much delay after they were arrested.

9. The learned Sessions Judge has considered the aforesaid three witnesses as truthful, though in our view that could be said only of Suresh/PW19 and Nitesh/PW21.

10. Anil/PW6 was taken by the deceased as a plucker to pluck the mangoes and before the Court he had so stated. He had further stated that the deceased had shown to him the tree from which the mangoes were to be plucked and after he had plucked the mangoes from one tree he climbed the other tree when the daughter of A-1/Vaman came to the property and suspecting that there might be a fight, he got down from the tree and at that time Jaidev/A-2 and Sanjeev/A-4 came there with iron rods and they ran towards the deceased and started assaulting him and he also saw Vaman/A-1 behind him who had raised a danda to hit him and he managed to dodge and ran away from the place of incident. In cross-examination he had admitted that he was aware that there was enmity between the accused persons and the landlord and therefore he was frightened on seeing the said daughter of Vaman/A-1. This witness was taken before Shri Usgaonkar/PW27 for the purpose of recording his statement under Section 164 of the Code and Shri Usgaonkar/PW27 in his evidence had stated that he was requested by the Police to record his statement but he had not recorded his statement as he had stated that he had no

knowledge of the incident which had taken place at Talewada and he had only stated that he had plucked the mangoes and as he came down from the tree, Vaman/A-1 tried to hit him, and as such he ran away from the place of incident. This position was brought to his notice in the course of his cross-examination and he stated that he had not made any such statement before the Special Judicial Magistrate Shri Usgaonkar/PW27. The learned Sessions Judge did take note of the fact that this witness was silent on the role played by Prashant/A-3 but has tried to explain this situation by observing that this witness had not witnessed the entire incident and he had ran away as soon Vaman/A-1 had tried to assault him and as such it was possible that he had not seen Prashant/A-3 and had left the place even before Prashant/A-3 had arrived at the place of incident and therefore his testimony could not be disbelieved either because he had not seen Prashant/A-3 or because he was silent on the role played by Prashant/A-3. The learned Sessions Judge also observed that Shri Usgaonkar/PW27 had not recorded his statement but had merely passed an Order and that he ought to have recorded his statement under Section 164 of the Code and what he had stated

before Shri Usgaonkar/PW27 could not be treated as a statement under Section 164 of the Code and in the absence of any such statement being recorded it could not be said that the said witness had in fact made such a statement before the SJM/PW27 or that he had resiled from his previous statement or that his testimony was inconsistent with the statement made under Section 164 of the Code. On behalf of the accused it has been submitted by the learned Senior Counsel that Anil/PW6 has not made any reference to the presence of Nitesh/PW21 or to all the accused inasmuch as he has not given the description of the injuries suffered by the deceased and therefore it is doubtful that he had at all seen the incident. It is also submitted that Anil/PW6 also made no reference to the presence of Suresh/PW19. In our view, the submission made on behalf of the accused deserves consideration. It is the very case of the prosecution that all the four accused came running at one time and also went away together and therefore Anil/PW6 could not have missed to mention the presence of Prashant/A-3. That apart he makes no reference to either Suresh/PW19 or for that matter Nitesh/PW21. In case he had seen the entire incident he would

have certainly narrated the same when he was taken to Shri Usgaonkar/PW27, the SJM. In between Anil/PW6 and Shri Usgaonkar/PW27 it is the latter who deserves more credence to be given, and whether Shri Usgaonkar/PW27 had recorded the statement of Anil/PW6 as required under Section 164(5) of the Code or whether what he had stated was recorded in the form of an order, the fact remains that Anil/PW6 had stated before the said SJM/PW27 that the moment he came down from the trees and Vaman/A-1 tried to hit him, he ran away from the place of incident. The subsequent version given by him before the Court as regards the assault on the deceased has got to be considered as an improvement. Nevertheless his evidence could be accepted to a limited extent as regards the presence of Vaman/A-1 reaching the scene and attempting to assault him.

11. Suresh/PW19 is the cousin of the wife of Vaman/A-1 and otherwise it appears that he was not on talking and visiting terms with the family of the accused for about ten years. It appears that he had an interest in the lease of plucking of the fruits given to the deceased Ranganath Bhinge by Vasant/PW2

for he had earlier stated before the SJM/PW27, when his statement was recorded under Section 164 of the Code, that he had taken the mango trees on hire on partnership basis. Otherwise one does not know what sort of assistance he had gone to give to the deceased in plucking the mangoes. Moreover, Vasant/PW2 has admitted the possibility that Suresh/PW19 might have been a partner of the deceased though at the same time he has reiterated that his agreement was only with the deceased. Suresh/PW19 is an injured witness whose injuries have been proved by the prosecution through the evidence of Dr. Mascarenhas/PW24 and it is difficult to believe that he would falsely implicate his own relations in order to shield the actual culprits. He stated that on 8-4-2003 at about 10.00 a.m. he went to Talewada at Narva to see his mother by his scooter. He also stated that the said Ranganath, the deceased, had requested him to assist in the plucking and the deceased had arranged Anil/PW6 for plucking the mangoes and there were other labourers and when Anil/PW6 was plucking the mangoes he had moved away when he heard the deceased Ranganath shouting for help and calling him and when he went near the mango tree

which was being plucked by Anil/PW6, he saw all the accused, Vaman/A-1 holding a danda and Jaidev/A-2, Prashant/A-3 and Sanjeev/A-4 holding iron rods and were abusing the deceased who had fallen near the branch of the trees and all of them were assaulting him with the said danda and the iron rods and the deceased had sustained several injuries and his clothes were stained with blood and as soon as the accused saw him they left the deceased Ranganath and rushed towards him and Jaidev/A-2 assaulted him by giving a blow of iron rod on his head and thereafter all the accused assaulted him with iron rods and dandas. He stated that the accused gave three blows of iron rods on his head and they assaulted him mostly on the left side of the body and on the right leg and threatened to kill him. He stated that he did not know as to why the accused had assaulted him. The learned Sessions Judge has discussed the evidence of this witness in para 11 of the Judgment. It has been submitted on behalf of the accused by their learned Senior Counsel that this witness has a tendency to prevaricate and there are material contradictions in his testimony to justify that he is not trustworthy or reliable. It is also submitted that Suresh/PW19 is

the son of brother of Vaman/A-1 and a cousin of the other accused and he would have claimed tenancy in case Jaidev/A-2 was not adopted by the said Pandurang Malvankar. We are unable to accept the above submissions of the learned Senior Counsel. It is not disputed that Pandurang had four daughters, one of whom is the wife of Vaman/A-1 and residing in the said property and the other daughters are married elsewhere and when the said Pandurang had direct descendants as to how Suresh/PW19 could have claimed a tenancy, claimed by the widow of Pandurang Malwankar and Jaidev/A-2. The evidence of Suresh/PW19 has been rightly accepted as trustworthy by the learned Sessions Judge. The variations noted in his evidence by the learned Sessions Judge in para 15 of the Judgment are too minor to be taken note of so as to discredit the version given by him. Discrepancies in the testimony of witnesses of minor character are required to be overlooked as long as they do not go to the root of the case of the prosecution. Suresh/PW19 is an injured witness and as already stated, related to the family of the accused. Nothing has been elicited in his cross-examination so as to discredit him. His evidence is reliable and has been

rightly relied upon by the learned Sessions Judge and his evidence shows that it is the accused who assaulted the deceased and him, as stated by him. He might have not seen how the incident started but he has certainly seen the deceased being assaulted by all the four accused and subsequently he himself became the victim of the assault by the accused.

12. The next eye witness examined by the prosecution is Nitesh/PW21. He works along with Sanjeev/A-4, as stated by him, in the Industrial Estate at Bicholim. He stated that on 5-4-2003 Sanjeev/A-4 had told him that their paddy field would be harvested on 8-4-2003 and had requested for his help and accordingly he went to Narva to the paddy field of the accused at about 10.00 a.m. on 8-4-2003 when all the accused were in their paddy field and they harvested the field and completed the work at 4.00 p.m. and brought the paddy to the house by rickshaw and he too returned to the house of the accused, had a wash and then had tea, and then went to change his clothes, when he saw the accused running with a danda and iron rods in their hands and he followed them to see as to why they were

running and went to a distance of about 30-35 meters and saw that the accused were assaulting one person who was lying on the ground, with danda and iron rods carried by them, and the said person had become unconscious and sustained injuries on the face and the accused also assaulted another person who was near the cowshed and who had sustained bleeding injuries and on seeing the said incident, from about 4-5 meters, he returned back and the accused also came back and when he was going to the bus stop in order to proceed to his house he saw Jaidev/A-2 and Prashant/A-3 proceeding on a Hero Honda Motorcycle and he requested them to drop him at Sounar, Mayem. In cross-examination he admitted that his statement was recorded by the SJM and that he had deposed before him that he had seen Prashant/A-3 and Sanjeev/A-4 assaulting an unknown person with iron rods and because he was in a nervous state of mind he had not stated that Vaman/A-1 and Jaidev/A-2 had also assaulted the said unknown person with wooden danda and iron rod. The evidence of this witness that he had assisted the accused in harvesting was admitted by one of the accused. His evidence that had he taken a lift on his way home from

Jaidev/A-2 and Prashant/A-3 was confirmed by Nilesh/PW3 whose evidencse the learned Sessions Judge has not accepted and we see no reason as to why the same ought not to have been accepted. Nilesh/PW3 was a Police Constable from Narva and though posted at Margao on the date of incident, he had come to Bicholim for his private work at the Bank and when he had boarded a KTC bus at the bus stop at Bicholim in order to come to his house at Narva at about 5.30 p.m, he had seen Jaidev/A-2 and Prashant/A-3 along with an unknown person going on a motorcycle of Hero Honda bearing No.GA-01-M-4188 and while Jaidev/Deepak/A-2 was riding the motorcycle, Prashant/A-3 was sitting in the middle and the unknown person was sitting at the end of the seat. Although Nilesh/PW3 had no occasion to identify Nitesh/PW21 as the third person on the said motorcycle, the said third person as seen by Nilesh/PW3 could not have been any other person than Nitesh/PW21, as stated by him, who had taken a lift from the said Jaidev/A-2 and Prashant/A-3 on his way home. The said accused were known to Nilesh/PW3 because all the accused reside at a distance of one km. from his house and it would not have been difficult for him to identify the

accused as they were going on a motorcycle when his bus had reached near a railway gate. In our view, there was no reason good enough for the learned Sessions Judge to have rejected his evidence as that of a chance witness. Nitesh/PW21 in his cross-examination had stated that he had not informed about the incident to anyone including any of his family members, and, it is contended by the learned Senior Counsel on behalf of the accused, that he is an unreliable witness as he had not disclosed to anyone including his nearest family members about the incident of assault. Reliance has been placed in this context on two decisions of this Court in the case of **State of Maharashtra** v. **B. S. Sangolkar**(1997 (2) B.Cr.517) and **Audumber Digambar Jagdane and others** v. **State of Maharashtra**(1999(1)B.Cr. 98). In the first case, the learned Division Bench was confronted whether to accept or reject the evidence of a solitary eye witness to the incident and one of the reasons why his presence was doubted was that the said witness had not informed his wife or other family members about the incident, although he had stayed for 3 to 4 days at his house. The second infirmity found was that the said witness had claimed that he had seen the incident as he

was on his way to Sangolkar Vasti where he had his relatives but had not made such a statement in his statement recorded under Section 161 of the Code and this was in the light of the fact that the witness had also stated that there was a shorter way to his house and had he not visited his relations, he would have taken that way. In the second case, one of the several reasons assigned by the Division Bench to disbelieve the versions given by PW3 and PW5 in that case was that there was failure on their part to disclose the incident to anybody till recording of their statements by the Police. Another reason was that their evidence was found with contradictions and omissions and was otherwise found to be unreliable and untrustworthy. In the case at hand, the presence of Nitesh/PW21 has been admitted by one of the accused and otherwise has been confirmed by Nilesh/PW3 and that apart there can be no uniform pattern of human behaviour in all circumstances. Some witnesses may be more secretive or tight lipped by nature and others may be loud mouthed or more vocal and only because a witness did not narrate the incident to his family members would per se be no ground to reject his evidence if found convincing in other respects. A situation

similar to this came for consideration before the Apex Court in the **State of U.P.** v. **Devendra Singh**((2004) 10 SCC 616) wherein the Apex Court observed that to discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. There is no set rule of natural reaction. Human behaviour varies from person to person. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counterattacking the assailants. Some may remain tight lipped, overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his own special way even in similar circumstances,

leave alone, the varying nature depending upon a variety of circumstances. In another case of **Rammi** v. **State of M.P.** ((1999) 8 SCC 649) the witness(a passenger in the bus) in his evidence had stated that he had seen the accused attacking the deceased with chopper and knives and the trial Court had pointed out that he did not inform the members of the family of the deceased nor did bring this matter to the notice of the police and the trial Court had regarded the above as a conduct incompatible with the normal behaviour of a person witnessing such a crime and the Hon'ble Supreme Court observed that such a remark on the conduct of a person who witnessed the murderous attack was least justified in the realm of appreciation of evidence. The Supreme Court further observed that it had time and again stated that the post-event conduct of a witness varies from person to person and it cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event and different persons are acting differently on seeing any violence and their behaviour and conduct would, therefore, be different. Only because Nitesh/PW21 did not tell his family

members about the incident, was no ground good enough to reject his evidence which otherwise was convincing and his presence at the scene was independently established. Nitesh/PW21 fairly admitted in his cross-examination that in his statement recorded by the SJM he had not implicated Vaman/A-1 and Jaidev/A-2 and that was because he was nervous. There is no dispute that the statement of this witness was recorded by the SJM on 26-4-2003, as stated by him, and his statement under Section 161 of the Code was recorded on 21-4-2003 and in which statement he had clearly implicated all the four accused. It may be true that Shri Usgaonkar/PW27 has denied that the witness was in a nervous state of mind and it is quite possible that Nitesh/PW21 knew what he was undergoing and which could not be seen by Shri Usgaonkar/PW27 who recorded his statement, and as rightly observed by the learned Sessions Judge it is also quite probable that only because Nitesh/PW21 missed referring to Vaman/A-1 and Jaidev/A2 in his statement under Section 164 of the Code when otherwise he had implicated all the accused in his earlier statement recorded under Section 161 of the Code was certainly no ground to reject his evidence. It is

to be noted that Nitesh/PW21 was working along with Sanjeev/A-4 and there was no particular reason why he should have falsely implicated his colleague or the other accused. In the absence of other satisfactory material to indicate as to why this eye witness should depose falsely against the accused there is no reason to disbelieve him more so when defence has failed to elicit anything in his cross-examination. His evidence was rightly relied upon by the learned Sessions Judge.

14. The evidence of Lavu/PW4, Premanand/PW5, Anil/PW6, Narayan/PW7, Suresh/PW19 and Nitesh/PW21 referred to and discussed herein above when considered as a whole is more than sufficient to conclude that it is the accused who inflicted the injuries found on the deceased Raghunath and Suresh/PW19. The evidence of the said witnesses and particularly of Suresh/PW19 and Nitesh/PW21 who have seen the incident of assault is trustworthy and reliable, to come to the conclusion that the injuries found on the persons of the deceased and Suresh/PW19 were caused by the accused.

15. Next, it is submitted by the learned Senior Counsel on behalf of the accused, that Section 34 I.P.C. is not attracted to show that all the accused had shared a common intention and therefore each of the accused has got to be independently assessed as far as the injuries suffered by the deceased and Suresh/PW19 are concerned and since there is no evidence to attribute particular injuries to particular accused, the accused is to be given benefit of doubt. Reliance has been placed on behalf of the accused on various decisions on the subject of common intention and particularly on the case of **Manaji Kaluji Thakor and others** v. **State of Gujarat**((2005) 9 SCC 310). In this case the incident had happened all of a sudden and the accused had attacked one Ranaji and Lakshmanji when they were seen going through the street and it was not the case of the prosecution that the accused were waiting for the said Ranaji and Lakshmanji to attack them. The second accused who had delivered the fatal injury on Ranaji had expired during the pendency of the appeal and the injury given by the first accused was proved to have been a simple injury and so also the injury inflicted by the third accused. The Apex Court observed that the accused possibly had

used the weapons that were available in the house and therefore it was difficult to hold that there was common intention on the part of the surviving accused for causing the death of Ranaji and therefore concluded that in the absence of common intention the said appellants would be liable to be convicted only under Section 324 r/w Section 34 I.P.C. Reliance has also been placed by the learned Senior Counsel on the other cases. It is not necessary for us to go in detail into the said cases and suffice it to observe that common intention is essentially a state of mind and can be only gathered by inference drawn from facts and circumstances in a given case. Ordinarily, intention is a matter within the personal knowledge of the person whose intention it is. It is a question of fact. Intention like any other fact may be proved either by direct or by circumstantial evidence. To constitute common intention, it is necessary that the intention of each of the accused is known to others and is shared by them. As stated in **Barendra Kumar Ghosh** v. **Emperor(**AIR 1925 P.C.1) "Section 34 I.P.C. deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all

as if he had done them himself; for "that act" and "the act" in the latter part of the Section must include the whole action covered by a "criminal act" in the first part of the Section". (See also para 29 of **Krishnan and another** v. **State** ((2003) 7 SCC 56). In this case the Apex Court has stated that "a charge under Section 34 IPC presupposes the sharing of a particular intention by more than one person to commit a criminal act. The dominant feature of Section 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a prearranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Section 34 IPC. The existence of common intention is to be the basis of liability. That is why the prior concert and the prearranged plan is the foundation of common intention to establish liability and guilt". In the case of **State of M. P.** v. **Deshraj and others**(2004 AIR SCW 924) the Supreme Court has stated that direct proof of common intention is seldom available and such intention can only be inferred from the circumstances appearing from proved

facts of the case and proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment, but it must necessarily be before the commission of the crime. In the case of **Ramjee Rai and others** v. **State of Bihar**(2006 AIR SCW 4816) the Apex Court has reiterated that "for the purpose of attracting Section 149 and/or 34 IPC, a specific overt act on the part of the accused is not necessary. He may wait and watch and the inaction on the part of an accused may some time go a long way to hold that he shared a common object with others". In the case at hand, all the accused belonged to one family and probably no sooner they learnt about the plucking of the mangoes by the deceased and his presence there for the said purpose, each of them picked up a weapon and ran to the deceased and each took part in the assault as stated by the witnesses and therefore it is obvious that they shared the common intention of assaulting the deceased. On the facts of

this case, it is obvious that all the accused shared a common intention of assaulting the deceased and Suresh/PW19 and had actually assaulted them, as stated by Suresh/PW19 and Nitesh/PW21 with the weapons they had carried. Whether they intended to cause the death of the deceased is a matter we shall refer to a little later.

16. That takes us to the circumstantial evidence of the recovery of the weapons. This evidence has been dealt with by the learned Sessions Judge in paras 32 to 39 of the Judgment. As stated by P.I. Chodankar/PW31 the weapons of assault, namely, MO.13 to MO.16 were recovered by him pursuant to the disclosure statements made by the said accused during interrogation and on being pointed out at the places shown by the said accused where the said weapons were kept by them. The evidence of P.I.Chodankar/PW31 and the evidence of Krishna/PW17 shows that MO.13 was recovered at the instance of Jaidev/A-2 on 17-4-2003 which was kept by Jaidev/A-2 under the wood and MO.16 was recovered at the instance of Vaman/A-1 on 19-4-2003 also kept under a pile of wood

pursuant to the panchanamas Exhs.49 and 50 respectively. Similarly, the evidence of P.I.Chodankar/PW31 and Atrish/PW18 shows that MO.14 was recovered on 18-4-2003 at the instance of Sanjeev/A-4 which was kept buried and MO.15 was recovered at the instance of Prashant/A-3 which was buried near a cashew tree in a paddy field pursuant to the panchanamas Exhs.52 and 53 respectively. Both Krishna/PW17 as well as Atrish/PW18 were extensively cross-examined and they have stood well the test of cross-examination. It is submitted on behalf of the accused by learned Senior Counsel that the said recoveries were made near about the scene of offence and the said weapons could have been recovered by the Police if the scene of offence was honestly or properly searched. There is nothing in the evidence of P.I.Chodankar/PW31 or for that matter Krishna/PW17 and Atrish/PW18 to suggest that the said weapons were found near about where the assault had taken place. The property of Lavande's of which tenancy is being claimed, is a vast property admeasuring over 89,000 sq. meters as per the documents produced by Vasant/PW2 and it was certainly not expected of the Investigation Officer to have carried out search of such a

vast property for the said weapons. Moreover the evidence shows that the said weapons were hidden by the accused. It is further submitted by the learned Senior Counsel that the CFSL report rules out human blood on the said weapons and therefore it is doubtful whether those weapons were at all used during the commission of the said offence and the said report otherwise also casts a doubt on the alleged recovery. As stated by P.I.Chodankar/PW31 the said weapons were seen having blood stains. However, the report of the CFSL has not established the blood group of the blood found on the said weapons inasmuch as it has also not been possible to determine whether it was human blood. In this context, reference could be made to the case of **State of Rajasthan** v. **Teja Ram and others**(1999 CRI.L.J. 2588) wherein the Supreme Court observed that failure of the Serologist to detect the origin of the blood due to disintegration of the serum does not mean that the blood stuck (on the axe in that case) would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and plasmatic coagulation that a Serologist might fail to detect the origin of the blood but it does

not mean that the blood might be of some other origin. Such a guess work that the blood on the other axe would have been animal blood is unrealistic and far fetched in the broad spectrum of this case. The effort of the Criminal Court should not be to prowl for imaginative doubts and unless the doubt is of a reasonable dimension, which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused. In the case at hand, not only have the weapons of offence been recovered at the instance of the accused, but the said weapons have also been identified as the weapons used, both by Suresh/PW19 and Nitesh/PW21 and not only that Dr. Sapeco/PW22 also opined that the injuries on the deceased could have been caused by the said weapons. The said discovery of the weapons at the instance of the accused is certainly a strong circumstance connecting the accused to the crime committed by them. The Apex Court in the case of **State of Maharashtra** v. **Suresh**((2000)(1) SCC 471) has held that when an accused points out the place where an incriminating material is concealed without stating that it was concealed by him

three possibilities arise: (1) that he himself had concealed it; (2) that he would have seen somebody else concealing it; and (3) he would have been told by another person that it was concealed there. But if the accused declines to explain that his knowledge about the concealment was on account of the last two possibilities, the Criminal Court can presume that the accused had concealed it himself and this is because the accused is the only person who can offer an explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the Court as to how else he came to know of it, the presumption is well justified course to be adopted by the Criminal Court that the concealment was made by him. We have no hesitation to accept the prosecution evidence and come to the conclusion that each of the accused had concealed the weapons of assault which were subsequently recovered at their instance.

17. The abscondence of the accused after the commission of the offence has also been abundantly proved by the prosecution. The evidence of Nilesh/PW3 shows that Deepak/A-2 and Prashant/A-3 had gone away towards Bicholim after the

incident. The evidence of Anil/PW13 shows that although Jaidev/A-2 was on casual leave from 8-4-2003 to 10-4-2003 and Sanjeev/A-4 was on leave from 6-4-2003 to 8-4-2003, both had not reported for duty from 11-4-2003 and 9-4-2003 respectively. The said accused gave no explanation as to why they had not reported for duty after the expiry of the said casual leave period or why they chose not to extend their leave. The evidence of Nilu/PW9 who is the brother-in-law of Prashant/A-3 shows that Jaidev/A-2 and Prashant/A-3 had gone to his house at Belgaum and stayed with him from 9-4-2003 to 12-4-2003 and the evidence of the Investigation Officer shows that he had made several efforts to trace the accused but the accused were not traceable. The evidence of Digambar/PW11 who is the brother-in-law of Jaidev/A-2 shows that it is he who made the accused to surrender before the Police on 16-4-2003 and therefore it is evident that the accused were not available and had absconded from the date of the incident till they were made to surrender on 16-4-2003 by Digambar/PW11. It may be true that abscondence itself may not be sufficient evidence to prove the guilt but in the case at hand, it is an additional circumstance which reinforces

the case of the prosecution. Reliance placed on the case of **Jalindar S/O Krishnanath Shinde** v. **State of Maharashtra** (2004(3) B Cr. C 156) is wholly misplaced. In that case, what was left after discarding of evidence, was the disappearance of the accused for a long period of time and on the basis of that it was held that it could not be said that the accused was involved in the offence. Abscondence of the accused is in itself no circumstance to convict an accused for murder. It is said that some times even innocent people out of fear or timidity run away from their houses but that is not the case herein where the prosecution has proved abscondence of the accused as yet another circumstance connecting the accused with the crime. Since the accused have given no explanation whatsoever as to where they were from 8-4-2003 to 16-4-2003, that would indicate beyond reasonable doubt that the accused had a guilty mind. The abscondence in this case can certainly be considered as an additional circumstance to reinforce the case of the prosecution.

18. The learned Senior Counsel has next submitted that vital evidence of the labourers who were cited in the charge-

sheet as witnesses nos.19 to 22 and whose names had figured in the complaint filed by Narayan/PW7 have not been examined and therefore the accused are entitled to an acquittal because their evidence was not produced and was made not available for appreciation. In our view, this submission of the learned Senior Counsel cannot be accepted. The said four witnesses were migrant labourers and it has been sufficiently explained by P.I.Chodankar/PW31 that he had obtained summons from the trial Court to trace them on two occasions as they were not found at Talewaddo, Narva and on two occasions teams were sent to Karnataka to search for them in Haveli Taluka, Sirgao District as that was their native place but they were not traceable. In our view, the non examination of the said witnesses cannot affect the case of the prosecution which otherwise is well established by examining two eye witnesses. This is not a case where adverse inference can be drawn for non examination of the aforesaid witnesses. It is to be noted that what is necessary to prove a case is quality of evidence and not quantity. The evidence of the eye witnesses cannot be rejected because some other eye witnesses were not examined. As

reiterated by the Apex Court in **Ramjee Rai** v. **State of Bihar** (supra) once the evidence of witnesses examined appears to be truthful, reliable and acceptable, the mere fact that some other witnesses have not been examined will not adversely affect the case of prosecution. Moreover, as stated by the Apex Court speaking through 3 learned Judges in Takhaji Hiraji v. Thakore (2001 Cr.L.J. 2602) the question of drawing adverse inference can come only if the witnesses were available and yet were being withheld.

19. The next submission of the learned Senior Counsel is that the learned trial Court has not at all considered that there was grave and sudden provocation given by the deceased for the accused to react in the manner they did. The learned Senior Counsel submits that the accused were provoked in seeing a stranger(the deceased) coming into the property and plucking the mangoes and the accused must have lost their head to act in the manner they did and at the most the case of the accused would be covered by Exception 1 to Section 300 I.P.C. The learned Senior Counsel further submits that Section 304 I.P.C.

(Part(I) and (II)) would also not be attracted because the case of the prosecution does not spell out that the accused committed the alleged acts by which death was caused, with the intention of causing death or causing such bodily injury as is likely to cause death or the alleged acts were done with the knowledge that they were likely to cause death but without any intention to cause death or such bodily injury which was to cause death. The learned Senior Counsel further submits that Section 326 also would not be attracted because the alleged acts were committed on grave and sudden provocation which is specifically excepted by the said Section, and, if at all the case of the prosecution could at the highest be pitched to Section 335 I.P.C. which provides for maximum imprisonment, extending to four years or fine or with both, and since the accused have already suffered imprisonment for nearly 3 1/2 years, that be considered as substantive sentence imposed on the accused.

20. We are not impressed with the submissions made by the learned Senior Counsel. The onus of proving one or the other exceptions is always on the accused but that onus can

certainly be discharged either by leading evidence or by bringing facts and circumstances to prove the plea through the prosecution evidence itself. It appears that no effort was made on behalf of the accused, in the cross-examination of the prosecution witnesses, to elicit facts from the said witnesses in support of such a plea nor it appears that such a plea was raised before the learned trial Court. However, in **State of U. P.** v. **Lakhmi**((1998) 4 SCC 336) the Apex Court has stated that the benefit of exception cannot be denied to the accused merely because the accused adopted another alternative defence during his examination under Section 313 of the Code and that such burden can be discharged either through defence evidence or through prosecution evidence by showing preponderance of probability, when an accused has to bear the evidential burden of showing grave and sudden provocation it is for the accused to establish with a balance of probability the circumstances which would bring his case within the exception. The test of "grave and sudden" provocation, is whether a reasonable man, not a hot-tempered or hypersensitive or unusual person belonging to the same society as the accused, placed in the situation in which

the accused is placed, would be so provoked as to lose his self control. No abstract standard of reasonableness can be laid down for the application of the doctrine of "grave and sudden provocation". What a reasonable man would do under certain circumstances also depends upon the customs, manners, way of life, traditional values, etc. and it is for the Court to decide in each case, having regard to relevant circumstances, whether there is sudden and grave provocation. Provocation, if any, must be such as to temporarily deprive the person provoked of the power of self control as a result of which he commits the act which causes death. No abstract rule of reasonableness can be laid down for the application of doctrine of grave and sudden provocation. In the case of **K. M. Nanavati** v. **State of Maharashtra** (AIR 1962 SC 605) it has been stated, by relying on **Mancini** v. **Director of Public Prosecutions**(1942 AC 1) that it is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self control, as a result of which he commits the unlawful act which causes death. The test to be applied was as laid down in **Rex** v.

Lesbini(1914 KB 1116). In applying the test, the Supreme Court observed that it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool and (b) to take into account the instrument with which the homicide was effected, for to retort in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. In our view, there was nothing sudden or grave which could have provoked the accused to have reacted in the manner they did. The accused ought to have known that mangoes would be plucked in that year on behalf of the landlord as was done in the previous year. There was an injunction against the accused obtained by the family of Vasant/PW2 after the matter was heard on merits and subsequently the deceased Raghunath had taken away the mango and cashew crops of the year 2002 and not only that had also cut the trees from the property on 23-8-2002 or thereabout and had come to pluck the mangoes on the fateful

day. The family of the accused might have had an exparte order given by Mamlatdar as against the family of Vasant/PW2 given in their favour by which the family of Vasant/PW2 were restrained from interfering with the possession of the said property, but even then the plea of grave and sudden provocation cannot be accepted.

21. It is now well understood that in the scheme of the Indian Penal Code "culpable homicide" is the genus and "murder" is the species and generally speaking "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". The Indian Penal Code recognizes three degrees of culpable homicide. The first degree of culpable homicide is "murder" which is defined by Section 300 and made punishable under Section 302 I.P.C. The second degree is culpable homicide as defined under Section 299 and made punishable under Section 304(I) I.P.C. The third degree of culpable homicide is made punishable under Section 304(II) I.P.C. As stated by the Apex Court in several of its decisions (see the latest reported in 2006 CRI. L. J. 2926) the academic

distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts and the confusion is caused, if Courts losing site of the true scope and meaning of the terms used by the legislature in these Sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The burden is always on the prosecution to prove affirmatively that the offence is one of murder. The Apex Court in the case of **Willie Slaney** v. **State of M.P.**(AIR 1956 SC 116) has stated that whether the accused causing the death of another and had no intention to kill, then the offence would be murder only if, (1) the accused knew that the injury inflicted would be likely to cause death, or (2) that it would be sufficient in the ordinary course of nature to cause death or, (3) that the accused knew that the act must in all probability could cause death and if the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under Section 304(II) I.P.C. The Apex Court in the case of **Kirkar**

Singh v. **State of Rajasthan**((1993) 4 SCC 238) has again held that in a given case if the case does not fall in any of the exceptions, it is the duty of the prosecution to prove that the offence is of murder and the ingredients of clauses (1 to 4) of Section 300 are satisfied.

22. The learned Sessions Judge has come to the conclusion that the injuries upon the deceased were inflicted with the intention of causing death or to cause such injuries as are likely to cause death. It is not the case of the prosecution at least now before this Court that the case is covered by Clause (1) of Section 300 (i.e. death was caused by an act with the intention of causing death) but it is their case that the case is covered under Clause(3) of Section 300 i.e. with the intention of causing bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. Obviously, it certainly could not be the case of the prosecution that the deceased was assaulted with the intention of causing death and this was due to the fact that the incident itself had taken place on the spur of the moment and without

premeditation, the moment the accused came to know that the deceased had come to pluck mangoes in the property of which they were claiming tenancy inasmuch as the very moment Suresh/PW19 reached the scene, the accused left the deceased and began assaulting Suresh/PW19. That would not have happened in case the accused had intended to cause the death of the deceased.

23. The case of **Virsa Singh** v. **State of Punjab**(AIR 1958 SC 465) dealing with the scope of clause 3 of Section 300 still remains as locus classicus, as stated by the Apex Court in several decisions including the case of **Ruli Ram and another** v. **State of Haryana**((2002) 7 SCC 691). Likewise, the case of **State of A.P.** v. **Rayavarapu Punnayya and another**(AIR 1977 SC 45) is yet another classical case to distinguish between a case of culpable homicide and murder and both have been followed in **Rajinder** v. **State of Haryana**(2006 CRI. L. J. 2926).

24. In this case **Rajinder** v. **State of Haryana**(supra) the Apex Court stated that according to the rule laid down in Virsa

Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. The illustration (c) appended to Section 300 clearly brings out this point.

25. In **State of A.P.** v. **Rayavarapu Punnayya and another**(supra) the Apex Court stated that whenever a Court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to a murder" on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such casual connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the Court

should determine whether the facts proved by the prosecution bringing the case within the ambit of any of the four Clauses of Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder" punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder" punishable under the first part of Section 304, Penal Code. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

26. If theoretically the Courts are required to keep focus on the key words used in various Clauses of Sections 299

and 300 for the purpose of finding out whether a given case is of "murder" or "culpable homicide" practically the Courts have always tried to find out whether a case is of "murder" or "culpable homicide" by trying to find out the intention or knowledge behind the act and the intention or knowledge is to be gathered from all circumstances and not merely from the consequences that ensue. As stated in the case of **Kikar Singh** v. **State of Rajasthan**(supra) it is not necessary that death must be inevitable or in all circumstances the injury inflicted must cause death. If the probability of death is very great the requirement of Clause Thirdly is satisfied. If there is probability in a less degree of death ensuing from the act committed the finding should be of "culpable homicide not amounting to murder". The emphasis is on sufficiency of injury to cause death and the Judge must always try to find out whether the bodily injury inflicted was that which the accused intended to inflict and the intention must be gathered from the facts and circumstances of a given case. The situs at which the injury is inflicted, nature of the injury, weapon used, force with which it was used are all relevant facts.

27. The question before the Court is whether the accused could have been convicted for murder or whether the accused deserves to be convicted for culpable homicide or for grievous hurt? As already stated, all the injuries found on Suresh/PW19 have been of simple nature. None of them have been proved to be grievous. Only because an injury is given on the head it is not necessary to infer that the accused intended to cause his death unless it was shown that it was given by force which is not the case at hand. On the contrary, Suresh/PW19 has clearly stated that he was assaulted mostly on the left side of his body and on the right leg and there has been no fractures on the said part of his body and only one injury was noticed on his scalp(vertex), all other injuries being mostly on his legs. Likewise, it can be seen from the evidence of Dr. Sapeco/PW22 that 11 of the injuries were on the legs of the deceased and there were fractures of right tibia and fibula bones only which shows that the fury of the attack on both the deceased as well as Suresh/PW19 was on their legs. Although five injuries were found on the head portion of the deceased, there was no fracture seen of the skull vault and base bones, which shows that the said

injuries were not inflicted by force. Except the fractures of right tibia and fibula bones all other injuries were of simple nature in as much as there were no fractures either of the ribs or vertebrae. The intention of the accused therefore appears to have been to break their legs and nothing more. None of the prosecution witnesses have stated as to how the said injuries on the head were caused or by which of the accused they were inflicted, and therefore it could not be ruled out that the said injuries were caused in the process of avoiding of the attack by the assailants. Although Dr. Sapeco/PW22 has opined that all the 22 injuries found on the deceased were fatal in the ordinary course of nature to cause death, his opinion does not appear to be free from doubt. In fact he has not stated whether any of the said injuries individually were fatal in the ordinary course of nature to cause death. The opinion given by medical witness need not be the last word on the subject and it can be always tested by the Court and in a case where the opinion is bereft of logic or objectivity, the Court is not obliged to go by that opinion. In the case of **Sarvan Singh and others** v. **State of Punjab**(AIR 1978 SC 1525), the Court took note of various

injuries found on the deceased in para 8 of the Judgment and stated that though the doctor had opined that the injuries were sufficient in the ordinary course of nature to cause death, the Hon'ble Supreme Court found it difficult to hold that the injuries cumulatively, were sufficient in the ordinary course of nature to cause death. None of the injuries intended to be inflicted per se were sufficient to cause death and it appears that the deceased died more due to hemorrhagic shock associated with the said injuries.

28. In the case of **Jai Narain Mishra and others(1972 SC 1764)** the Apex Court observed that where three out of four injuries sustained were of simple nature and fourth one though endangering life could not be deemed to be an injury which would have necessarily caused death but for timely medical aid benefit of doubt to the accused causing the fourth injury had to be given. The benefit of doubt was given to the accused Suraj with regard to the injury intended to be caused and the offence was held to be one under Section 326 I.P.C. and not under Section 307 I.P.C.

29. In the case of **M/s. Formina S. Azardeo and another** v. **State of Goa**(AIR 1992 SCC 133), the accused tied the deceased to electric pole and assaulted him and the intention was to teach the deceased lesson for spreading scandalous information concerning alleged amorous intimacy between the accused and in the absence of definite evidence attributing definite overtact to any of the accused and in the absence of any of the accused having expressed intention to kill the deceased and any of them having not been armed with deadly weapons, the offence was held to be under Section 326 r/w 34 I.P.C. The conviction under Section 302 r/w 34 I.P.C. was set aside.

30. In the case of **Rama Meru and another** v. **State of Gujarat**(1993 Supp(1) SCC 315) the death was caused by multiple knife injuries caused by sticks and stones and gun shots caused by seven persons and though the medical opinion stated that all the injuries were collectively sufficient to cause death, individually none of the injuries were likely to cause death. The knife injuries had remained unexplained by the

prosecution and the Supreme Court therefore held that common intention to murder was not conclusively established by the prosecution beyond reasonable doubt and the conviction by the High Court under Section 302 r/w 34 I.P.C. was set aside and the conviction under Sections 326/34 as imposed by the Court of Sessions was maintained. The case at hand is very similar to the case of **Rama Meru and another** v. **State of Gujarat**(supra) and it is not the case of prosecution that any of the injuries on the deceased were individually likely to cause death.

31. In the case of **Chowa Mandal and another** v. **State of Bihar**(AIR 2004 SC 1603) two accused were returning back and came across the deceased. The accused were enraged by unwanted questioning of the deceased and the accused wielded lathis and gave a single lathi blow and the Apex Court observed that the incident in question had occurred on the spur of the moment without there being any intention of causing death or causing such injury as they knew was likely to cause death and was an act arising of the enmity they had with the nephew of the deceased and aggravated by unwanted questioning of the

deceased. The Supreme Court therefore held that there was no justification for convicting the accused under Section 304/34 and therefore modified the conviction under Section 326 r/w 34 I.P.C.

33. Considering the facts of the case where the incident occurred on the spur of the moment when the deceased came for the plucking of the mangoes in the property of which the accused were claiming tenancy and further considering that most of the injuries were inflicted on the lower limbs of the deceased and Suresh/PW19, it cannot be said that the injuries inflicted were sufficient to cause death in the ordinary course of nature. Further it was not known whether the injuries on the head or other parts of the body except legs were inflicted during a struggle or grappling. In the circumstances, the case of the prosecution could not be pitched under Clause "Thirdly" of Section 300 I.P.C. In our view, this would be a fit case to scale down the conviction from Sections 302/34 I.P.C. to Sections 326/34 I.P.C. in relation to the deceased and from Sections 307/34 I.P.C. to Section 324/34 I.P.C. in relation to

Suresh/PW19 and reduce the sentence from life imprisonment to six years R.I. and from five years to one year R.I. with a direction that both the sentences should run concurrently. The fines imposed and the imprisonment ordered to be undergone for default, shall remain unaltered. Consequently, we allow the appeal partly and the Judgment of the learned Sessions Judge shall stand modified accordingly.

DR. S. RADHAKRISHNAN, J.

N. A. BRITTO, J.

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